No. 93-143

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

STATE OF NORTH CAROLINA,
Petitioner,

v.

LONNIE WINSLOW BALLARD and
JOSEPH EARL BATES,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE NORTH CAROLINA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

DOES THE UNITED STATES CONSTITUTION MANDATE *EX PARTE* HEARINGS FOR INDIGENT DEFENDANTS WHO ATTEMPT TO MAKE A THRESHOLD SHOWING FOR EXPERT ASSISTANCE?

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PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, the State of North Carolina, by and through its undersigned counsel, the Honorable Michael F. Easley, Attorney General of North Carolina, and Assistant Attorneys General Jeffrey P. Gray, David F. Hoke, and Valerie B. Spalding, respectfully pray that a writ of certiorari issue to review the judgments of the North Carolina Supreme Court, entered on April 8, 1993, which set aside Respondent Lonnie Ballard's guilty verdict and life sentence, set aside Joseph Bates' guilty

verdict and death sentence, and awarded both defendants new trials.[1]

OPINIONS BELOW

This petition seeks review of the published decisions by the North Carolina Supreme Court, which are reported at ***State v. Ballard***, 333 N.C. 515, 428 S.E.2d 178 (1993), and ***State v. Bates***, 333 N.C. 523, 428 S.E.2d 693 (1993), and which are reproduced in the Appendix at A1-A17.

JURISDICTION

The judgments of the North Carolina Supreme Court were entered on April 8, 1993.[2] The jurisdiction of this Court to review the North Carolina Supreme Court's decision is invoked pursuant to 28 U.S.C. § 1257(3) and Rule 10.1(b) and (c) of the Rules of the Supreme Court of the United States.

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1 The parties to this proceeding are the Petitioner, the State of North Carolina (hereinafter referred to as "the State"), and Respondents Lonnie Ballard (hereinafter referred to as "Ballard") and Joseph Bates (hereinafter referred to as "Bates").

2 The opinions of the North Carolina Supreme Court were filed on April 8, 1993. The actual judgments, however, are entered in the docket by the clerk twenty (20) days after the date of the filing of the opinions. N.C. R. App. P. 32(b).

CONSTITUTIONAL AMENDMENTS AND STATUTORY PROVISIONS

U.S. Const. Amend. V: No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;

U.S. Const. Amend. VI: [T]he accused shall enjoy the right . . . to have the assistance of counsel for his defense;

U.S. Const. Amend. XIV, § 1: [N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Respondent Lonnie Winslow Ballard

On April 17, 1990, following a brief argument, Ballard shot and killed the victim, Marlon Branch, in broad daylight on the streets of Durham, North Carolina, before numerous eye-witnesses. He was indicted for first degree murder, was tried non-capitally before a jury, and was convicted as charged on February 28, 1992. The trial court imposed a mandatory life sentence.

Prior to trial Ballard filed a "Motion for Appointment of Psychiatric Expert" to assist in the preparation of his defense, requesting therein an *in camera* review of information in support of his motion. At a pre-trial motions hearing on October 11, 1990, the judge inquired of Ballard if he was asking for the requested *in camera* review to be *ex parte*, without the presence of the prosecutor. Ballard asked that the *in camera* review be *ex parte*, "[w]ithout the presence of the District Attorney." The trial court, specifically recognizing this Court's holding in ***Ake v. Okla-***

homa, 470 U.S. 68 (1985), and North Carolina cases, offered Ballard the opportunity to make an ***Ake*** showing of "particularized need" in open court. Ballard stated that he would not give the trial court a showing of particularized need in the presence of the prosecutor. The trial court thereupon denied Ballard's motion for an *in camera* review of the information, *ex parte* of the State.

Following Ballard's trial and conviction, his appeal was heard in the North Carolina Supreme Court on March 17, 1993. The supreme court granted Ballard a new trial, holding that the United States Constitution and ***Ake*** require *ex parte* hearings for indigent defendants who attempt to make ***Ake*** threshold showings for expert assistance. ***State v. Ballard***, 333 N.C. 515, 428 S.E.2d 178 (1993).

B. Respondent Joseph Earl Bates

On August 12, 1990, Bates beat Charles Edwin Jenkins, bound him with ropes, threw him in the back of his jeep, drove to an isolated wooded area, tied him to a tree, made inquisition of him at gunpoint, tortured him, made him cry and crawl, shot him in the neck and finally killed him. Bates then tied a cinder block around the victim's neck and threw the body into the river. The body was discovered thirteen days later.

Bates was indicted in October 1990, by the Grand Jury for Yadkin County, North Carolina, for the first degree murder and first degree kidnapping of Charles Edwin Jenkins. Trial commenced on February 25, 1991, and on February 28, 1991, the jury found Bates guilty of first degree kidnapping and of first degree murder on the bases of both premeditation and deliberation and felony murder. At sentencing, the jury found the aggravating circumstances that the murder had been committed while defendant was engaged in the commission of a kidnapping and that it had been especially heinous, atrocious or cruel. Among

the circumstances in mitigation the jury found that the murder had been committed while Bates was under the influence of mental or emotional disturbance, but it did not find that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law had been impaired. After weighing the mitigating and aggravating circumstances it had found, the jury recommended that Bates be sentenced to death.

Prior to trial, on November 29, 1990, Bates filed a motion for an *ex parte* hearing, seeking appointment of an expert witness. His "Notice of Defense of Insanity and Intent to Introduce Expert Testimony Relating to Mental Disease, Defect or Condition" was filed the next day.

At a pre-trial motions hearing held on December 18, 1990, Bates orally moved for an *ex parte* hearing for funds necessary to employ expert witnesses, and the trial court denied the request for an *ex parte* hearing. Bates then tendered a motion for funds for expert assistance, to which was attached an affidavit by a forensic psychologist, who never had any direct contact with him, offering a "preliminary opinion" that Bates was "probably" disturbed. The trial court denied Bates' motion for his own expert, but allowed the State's motion that he be evaluated in response to his notice of intent to rely on the defense of insanity. The trial court accordingly ordered that Bates be sent to a state hospital for evaluation of his sanity at the time of the alleged offenses and determination of his capacity to proceed to trial, reserving his right to file another motion for funds for expert assistance if additional information was forthcoming.

On January 16, 1991, Bates again tendered a motion for the expert assistance of a psychologist. He did <u>not</u> reiterate his request that the hearing be *ex parte* and in support of his motion attached the very same "preliminary opinion" affidavit of the

same forensic psychologist. The trial court had before it the results of Bates' formal state hospital evaluation, which stated that his memory was "intact with no obvious perceptual motor difficulties," his cognitive functioning represented no brain dysfunction or deterioration, and his personality showed "[n]o indications of mood or thought disorder." The evaluating psychiatrist concluded that Bates did not have "a disorder that would prevent him from being capable of proceeding to trial or relieve him of responsibility for his actions." The trial court denied Bates' motion for funds for expert assistance by written order dated January 24, 1991.

The following day, Bates petitioned the North Carolina Supreme Court for certiorari, supersedeas and temporary stay, citing both the trial court's failure to allow his motion for expert assistance to be heard *ex parte* and its denial of the motion itself as subjects of the requested review. The supreme court denied his petitions on February 7, 1991.

Following Bates' trial, conviction, and sentence of death, his appeal was heard in the North Carolina Supreme Court on October 6, 1992. On April 8, 1993, the supreme court granted Bates a new trial, relying solely on its holding of the same day in ***State v. Ballard***, 333 N.C. 515, 428 S.E.2d 178 (1993), that "it is error to deny the motion of an indigent defendant for an *ex parte* hearing regarding his request for the assistance of a psychiatrist." ***State v. Bates***, 333 N.C. 523, 527, 428 S.E.2d 693, 695 (1993).

REASONS WHY THE WRIT SHOULD ISSUE

THE NORTH CAROLINA SUPREME COURT'S HOLDING THAT THE UNITED STATES CONSTITUTION MANDATES *EX PARTE* HEARINGS FOR AN INDIGENT DEFENDANT ATTEMPTING TO MAKE A THRESHOLD SHOWING FOR EXPERT ASSISTANCE DECIDED A SUBSTANTIAL FED-

ERAL QUESTION CONTRARY TO ***AKE v. OKLAHOMA***, AND RAISES AN IMPORTANT ISSUE OF FEDERAL CONSTITUTIONAL LAW WHICH IS WORTHY OF CERTIORARI REVIEW.

I. ***Ake v. Oklahoma*** Created No Constitutional Right Or Mandate to Implement the ***Ake*** Threshold Showing *Ex Parte*.

In 1993, after years of opinions sensibly based on North Carolina statutory law, and a 1992 decision directly to the contrary, ***State v. Phipps***, 331 N.C. 427, 418 S.E.2d 178 (1992), the North Carolina Supreme Court suddenly made the extraordinary decision that all indigent criminal defendants had a federal constitutional right to attempt to make threshold showings for psychiatric experts on an *ex parte* basis. ***State v. Ballard***, 333 N.C. 515, 428 S.E.2d 178 (1993); ***State v. Bates***, 333 N.C. 523, 428 S.E.2d 693 (1993). The decision was based on what the court erroneously described as the "holding" in ***Ake v. Oklahoma***, 470 U.S. 68 (1985). Considered in the light of the supreme court's correct interpretation of ***Ake*** in its immediately preceding ***Phipps*** decision, the error is not only fundamental and egregious, but also appears to be a deliberate creation of a federal constitutional right, applicable to North Carolina only, where none in fact exists.[3]

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3 It also jeopardizes other State statutes. ***See, e.g.***, N.C. Gen. Stat. § 15A-959(a) (1988) (if a defendant intends to raise the defense of insanity, he must file notice of that intent).

In ***Ake***, the defendant was charged with murdering a couple and wounding their two children. Ake's behavior at arraignment and other earlier proceedings was so bizarre that the trial court ordered him to be psychiatrically examined. ***Id.*** at 71. Ake was committed to a state hospital to be evaluated with respect to his competency to stand trial. A few months later, a competency hearing was held, at which the trial court found Ake incompetent to stand trial and further committed him to the mental hospital. ***Id.*** Six weeks later, Ake became competent, and the State resumed proceedings against him. At a pre-trial conference, Ake's attorney informed the trial court that his client would raise an insanity defense, and requested a psychiatrist at State expense. The trial court rejected this request. ***Id.*** at 72. Ake was subsequently tried for two counts of first degree murder and two counts of shooting with intent to kill. His sole defense was insanity, but none of the hospital psychiatrists could testify about his mental state at the time of the crimes since they had not examined him on that point. There was therefore no expert testimony for either side on Ake's sanity at the time of the offenses. ***Id.*** The jury returned a verdict of guilty on all counts and *inter alia* sentenced Ake to death on each of the two murder counts. ***Id.*** at 73. On appeal, Ake argued that, as an indigent defendant, he should have been provided with the services of a court-appointed psychiatrist as a matter of constitutional right. The Oklahoma Court of Criminal Appeals rejected Ake's argument, and affirmed his convictions and sentences. ***Id.***

On certiorari to the Supreme Court of the United States, the issue was again presented in constitutional terms. Prior to its in-depth analysis, this Court indicated its decision as follows:

> [W]hen a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access

> to a psychiatrist's assistance on this issue, if the defendant cannot otherwise afford one.

Id. at 74.

This Court noted that it had "long recognized that when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense." *Id.* at 76. Indeed, fundamental fairness entitles the indigent defendant to "an adequate opportunity to present [his] claim[] fairly within the adversary system[.]" *Id.* at 77, quoting ***Ross v. Moffitt***, 417 U.S. 600, 612 (1974). In short, the State is constitutionally required to purchase the basic tools of an adequate defense for indigent defendants.

With specific reference to Ake himself, this Court determined that three factors were relevant: (1) the private interest affected by the State's action; (2) the government's fiscal interest; and (3) the probable value of additional or substitute procedural safeguards. *Id.* Having weighed these factors, the Court concluded

> that, without the assistance of a psychiatrist to conduct a professional examination on issues relevant to the defense, to help determine whether the insanity defense is viable, to present testimony, and to assist in preparing the cross-examination of a State's psychiatric witnesses, the risk of an inaccurate resolution of sanity issues is extremely high.

Id. at 82. This Court noted, however, that although a defendant's mental condition is not at issue in every criminal proceeding, "[w]hen the defendant is able to make an *ex parte* threshold showing to the trial court that his sanity is likely to be a significant factor in his defense, the need for the assistance of a psychiatrist is readily apparent." *Id.* at 82-83. Ake had made such a showing and was thus entitled to the assistance of a psychiatrist. *Id.* at 86. Finally, this Court reiterated its holding:

> [W]hen a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.

Id. at 83. The implementation of this constitutional right to psychiatric assistance was left to the States. *Id.*

Chief Justice Burger, concurring, noted that nothing in the majority opinion reached non-capital cases. *Id.* at 87. Justice Rehnquist, dissenting, would have limited the "rule" to capital cases and would have clarified that the entitlement was to an independent evaluation, not to a defense consultant. *Id.*

This Court's holding in *Ake* could scarcely be more plain: When an indigent defendant makes a threshold showing that his sanity at the time of his crime is likely to be a significant factor at trial, he is constitutionally entitled to the assistance of a court-appointed psychiatrist. Nowhere is there any mention of a constitutional right or mandate that a hearing to determine the need for a psychiatrist must be *ex parte* in nature. Indeed, the

phrase "*ex parte*" appears only once in the opinion; it is *dictum*, and is based on the procedural posture peculiar to Ake's case.[4] ***Id.*** at 82. Accordingly, an indigent criminal defendant has no federal constitutional right to make his threshold showing for psychiatric assistance in an *ex parte* hearing.

II. The North Carolina Supreme Court Erroneously Established a Federal Constitutional Right Requiring ***Ake*** Threshold Showings Be Implemented *Ex Parte*.

In North Carolina, the method of implementing the right to a court-appointed psychiatrist and other expert witnesses has been provided for by statute. It is the State's responsibility to provide an indigent defendant with counsel and the other necessary expenses of representation. The trial court, in its discretion, may approve a fee for the services of an expert witness who testifies for an indigent defendant. N.C. Gen. Stat. §§ 7A-450(b), -454 (1986). Neither statutory section provides for an *ex parte* hearing. The North Carolina Supreme Court has interpreted these sections to require that expert assistance be provided only upon a showing by the defendant that there is a reasonable likelihood that it will materially assist him in the preparation of his defense, or that without such help it is probable that he will not receive a fair trial. *See, e.g.*, ***State v. Gardner***, 311 N.C. 489, 319 S.E.2d 591 (1984), *cert. denied*, 469 U.S. 1230 (1985). The

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4 Oklahoma had no statute or judicial decision requiring an *ex parte* hearing at the time Ake was tried. *See* ***McGregor v. State***, 733 P.2d 416 (Okla. Crim. App. 1987).

supreme court has repeatedly so held.[5] The thrust of the supreme court's cases is (1) that the ***Ake*** decision is consistent with its own prior decisions holding that a defendant must show a particularized need for the requested expert, and (2) that the test originally developed under N.C. Gen. Stat. § 7A-454 remains valid.[6]

In ***State v. Phipps***, 331 N.C. 427, 418 S.E.2d 178 (1992), a first degree murder tried capitally but for which the defendant received a life sentence, the trial court denied Phipps' motion for an *ex parte* hearing for additional expert assistance. On appeal to the North Carolina Supreme Court, Phipps argued that the trial court's ruling violated his right to due process of law, to the effective assistance of counsel, and to be reliably sentenced in a capital trial. Phipps contended that specific language in ***Ake*** guaranteed him a right to an *ex parte* hearing on his motion for expert assistance. ***Id.*** at 447, 418 S.E.2d at 188. The supreme court noted that although this Court referred to an "*ex parte* threshold showing" in ***Ake***, it had left the decision on how to

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5 ***State v. Phipps***, 331 N.C. 427, 418 S.E.2d 178 (1992); ***State v. Tucker***, 329 N.C. 709, 407 S.E.2d 805 (1991); ***State v. Bridges***, 325 N.C. 529, 385 S.E.2d 337 (1989); ***State v. McLaughlin***, 323 N.C. 68, 372 S.E.2d 49 (1988), *judgment vacated*, 494 U.S. 1021 (1990), *on remand*, 330 N.C. 66, 408 S.E.2d 732 (1991); ***State v. Moore***, 321 N.C. 327, 364 S.E.2d 648 (1988); ***State v. Smith***, 320 N.C. 404, 358 S.E.2d 329 (1987); ***State v. Penly***, 318 N.C. 30, 347 S.E.2d 783 (1986); ***State v. Johnson***, 317 N.C. 193, 344 S.E.2d 775 (1986); ***State v. Hickey***, 317 N.C. 457, 346 S.E.2d 646 (1986); ***State v. Artis***, 316 N.C. 507, 342 S.E.2d 847 (1986).

6 *See* ***Caldwell v. Mississippi***, 472 U.S. 320 (1985) (no due process violation when defendant's showing of need is little more than undeveloped assertions that requested assistance would be beneficial; no mention of *ex parte* hearing).

implement the constitutional right to expert assistance to the States. ***Id***. The supreme court further noted that its opinions had often quoted the "*ex parte*" language from ***Ake***, but the issue had not squarely arisen as it did in ***Phipps***. ***Id***.

The supreme court then looked to the federal courts and decisions from other States for guidance on the issue of whether an *ex parte* hearing on a motion for expert assistance is constitutionally required.[7] The supreme court concluded that

> the decision to grant an *ex parte* hearing is within the trial court's discretion. Though such a hearing may in fact be the better practice, it is not always constitutionally required under ***Ake***.
>
> . . . .
>
> Whereas an indigent defendant's ~~aeeess~~ to the "basic tools of an adequate defense" is a core requirement of a fundamentally fair trial, the need for an *ex parte* hearing on a motion for expert assistance is not. Defendant may participate

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7 *See, e.g.*, ***Thor v. United States***, 574 F.2d 215 (5th Cir. 1978) (right to *ex parte* hearing pursuant to Federal Rule of Criminal Procedure 17(b) does not appear to rise to constitutional level); ***State v. Floody***, 481 N.W.2d 242 (S.D. 1992) (defendant's rights to due process and equal protection not violated by state statute requiring that appointment of expert witnesses be made only after reasonable notice to the parties); ***Brooks v. State***, 259 Ga. 562, 564, 385 S.E.2d 81, 83 (1989), *cert. denied on other grounds*, 494 U.S. 1018 (1990) (***Ake*** "does not clearly mandate that the hearing be *ex parte*"); ***McGregor v. State***, 733 P.2d 416 (Okla. Crim. App. 1987) (manifest intention of majority in ***Ake*** that hearings be held *ex parte*).

> meaningfully in the preparation of his defense even though the prosecutor is present for and contests his motion for expert assistance.
>
> The primary justification for an *ex parte* hearing is that it allows an indigent defendant to make a detailed showing, sufficient to meet the ***Ake*** threshold, of his need for expert assistance without alerting the prosecution to vital trial strategy and theories of defense. Though this a desirable advantage, and one available to both the State and nonindigent defendants, we conclude that its absence does not necessarily render the trial of an indigent defendant fundamentally unfair.

Id. at 449-50, 418 S.E.2d at 190. The supreme court recognized that the ***Ake*** decision included several references suggesting that an *ex parte* hearing is not necessarily required. ***Id.*** at 450, 418 S.E.2d at 190. Finally, the court held:

> ***Ake*** did not mandate that motions for expert assistance be heard *ex parte*. We also conclude that an *ex parte* hearing is not constitutionally required in every case. There are strong reasons for conducting the hearing *ex parte* and the court may, in its discretion, do so.

Id. at 451, 418 S.E.2d at 191 (emphasis added). The supreme court overruled Phipps' assignment of error. One month later, in another capitally tried first degree murder in which the defendant received the death penalty, the court addressed the issue of whether the defendant's motion for a state-paid mental health expert was properly denied where, although he was financially unable to employ the expert, he was nevertheless not represented by court-appointed counsel. ***State v. Boyd***, 332 N.C. 101, 107, 418 S.E.2d 471, 475 (1992). In a footnote, the supreme court

cited ***Phipps*** as controlling the issue of whether an *ex parte* hearing is required. ***Id.*** at 108, n.2, 418 S.E.2d at 475, n.2.

At this point, then, from the supreme court's decisions in ***Phipps*** and ***Boyd***, based upon ***Ake***, the trial courts in North Carolina had a clear understanding of their discretionary power to permit an indigent defendant to attempt to make his threshold showing for court-appointed expert assistance in an *ex parte* proceeding. But less than a year later, in April 1993, the North Carolina Supreme Court engaged in what can only be described as a "bait and switch" maneuver. While trial courts were properly exercising discretion in addressing whether the ***Ake*** showing be conducted *ex parte*, the supreme court decided ***State v. Ballard***, 333 N.C. 515, 428 S.E.2d 178 (1993), holding that the United States Constitution now requires the ***Ake*** threshold showing be implemented through *ex parte* proceedings. The supreme court then utilized the holding of ***Ballard***, a non-capital case, to award a new trial to respondent Bates, who received the death penalty for the especially heinous, atrocious, cruel and torturous murder he committed.

North Carolina is now encumbered with a federal constitutional *ex parte* mandate for all ***Ake*** threshold showings, when in fact neither the Constitution nor ***Ake*** create such a right. Thus, ***Ballard*** and ***Bates*** place squarely before this Court the important federal question of whether the United States Constitution mandates ***Ake*** threshold showings be held *ex parte*, a question States across the nation have answered with much discord.

III. States Addressing Whether the *Ake* Threshold Showing Must Be Implemented *Ex Parte* Are In Conflict.

In addressing this issue, States have ranged from one extreme to the other. Some have mandated *ex parte* hearings for

Ake threshold showings, while others have concluded that no such mandate exists. The latter States have properly distinguished ***Ake's*** holding from its *dictum*.

To demonstrate the discord, the Oklahoma Court of Criminal Appeals, in a one-page opinion, simply held that "[t]he intention of the majority of the ***Ake*** Court that such hearings be held *ex parte* is manifest . . . ." ***McGregor v. State***, 733 P.2d 416, 416 (Okla. Crim. App. 1987). Other courts have simply quoted the ***Ake*** *ex parte dictum* in the context of the required threshold showing of need.[8] On the other hand, South Dakota has decided firmly against an *ex parte* requirement. In ***State v. Floody***, 481 N.W.2d 242 (S.D. 1992), the South Dakota Supreme Court distinguished ***Ake's*** actual holding from its *dictum*. The supreme court reasoned that trial courts need broad discretion to scrutinize government expenditures for expert assistance which are subject to great abuse. The supreme court noted that the greater amount of information generated by an adversarial hearing better equips trial courts to discern the assistance truly necessary for the basic

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8 *See, e.g.*, ***Stanger v. State***, 545 N.E.2d 1105 (Ind. Ct. App. 1989) (citing language in ***Ake*** regarding *ex parte* showing of need); ***State v. Newcomer***, 737 P.2d 1285 (Wash. Ct. App.), *disc. rev. denied*, 109 Wash. 2d 1014 (1987) (same); ***Wall v. State***, 715 S.W. 2d 208 (Ark. 1986) (same).

tools of defense, and thereby prevents abuse of the right to court-appointed expert assistance. ***Id.*** at 256. This analysis of ***Ake*** is correct and has also found support from other courts.[9] Furthermore, although the majority of States do not statutorily provide for court-appointed expert assistance for indigent defendants, those that do are not uniform in approach and give little or no guidance as to whether the procedure must be implemented *ex parte*.[10]

Ballard and ***Bates*** epitomize this discord. While the issue of whether the ***Ake*** threshold showing must be implemented *ex parte* was raised only by virtue of the procedural posture in that case, and was mentioned only in *dictum*, the North Carolina Supreme Court has now transformed that *dictum* into a federal constitutional right. Therefore, these cases present this Court

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9 *See, e.g.*, ***State v. Phipps***, 331 N.C. 427, 418 S.E.2d 178 (1992) (whether threshold showing must be *ex parte* not squarely addressed by ***Ake***); ***Brooks v. State***, 259 Ga. 562, 385 S.E.2d 81 (1989), *cert. denied on other grounds*, 494 U.S. 1018 (1990) (*ex parte* proceeding not constitutionally mandated by ***Ake***; *ex parte* rule fashioned as matter of state law); ***Clark v. State***, 467 So. 2d 699 (Fla. 1985) (***Ake*** holding distinguished from *dictum*).

10 *See, e.g.*, Ariz. Rev. Stat. Ann. § 13-4013 (1991) (defendant shall apply for expert services without specifying procedure); Cal. Penal Code § 987.9 (1985 & Supp. 1992) (providing that defendant's application for funds be kept confidential); Fla. Stat. ch. § 914.06 (1990) (court awards compensation to indigent defendant's expert without specifying application procedure); Kan. Stat. Ann. § 22-4508 (1990 & Supp. 1991) (*ex parte* application without addressing notice of application); N.C. Gen. Stat. § 7A-454 (1991) (court has discretion to approve fee for indigent defendant's expert); Tex. Crim. Proc. Code Ann. § 26-05 (1992) (substantive guidelines for reimbursement without establishing any procedure).

with the perfect opportunity to answer the important federal question: Does the United States Constitution mandate *ex parte* hearings for indigent defendants who attempt to make a threshold showing for expert assistance? The answer is no, and based upon the federal question itself, the misuse of the ***Ake v. Oklahoma*** *dictum*, and the variance between the States grappling with this question, this Court needs to articulate that answer.

CONCLUSION

For the foregoing reasons, the State respectfully requests that a writ of certiorari issue to review the decisions of the North Carolina Supreme Court.

Respectfully submitted,

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July 27, 1993

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IN THE SUPREME COURT OF NORTH CAROLINA

FILED
April 8, 1993

STATE OF NORTH CAROLINA	)	
	)	
v.	)	No. 255A92 - Durham
	)	
LONNIE WINSLOW BALLARD	)	

Appeal of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Hight, J., at the 26 February 1992 Regular Criminal Session of Superior Court, Durham County, on a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 17 March 1993.

Michael F. Easley, Attorney General, by Jeffrey P. Gray, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Janine Crawley, Assistant Appellate Defender, for defendant-appellant.

WHICHARD, Justice.

Defendant was tried in a noncapital trial for murder in the first degree of Marlon Branch. The trial court denied defendant's motion that he be allowed to give evidence supporting his request for appointment of a psychiatric expert *in camera* and *ex parte*. We hold that an indigent defendant who requests that evidence supporting his motion for expert psychiatric assistance be presented in an *ex parte* hearing is constitutionally entitled to have such a hearing, and that the trial court erred in denying defendant's request to be heard on this matter *ex parte*.

On 11 October 1990 defendant's court-appointed counsel moved before Judge Orlando F. Hudson for an *in camera* review of information supporting the appointment of a psychiatric expert to assist defendant in the preparation of his defense. When Judge Hudson asked whether the *in camera* review was to be "with or without the prosecutor," defense counsel responded: "Without the presence of the District Attorney." Judge Hudson then denied the motion, but offered to hear such information in open court. Defense counsel moved for the appointment of a psychiatric expert but stated that he could not "particularize [defendant's] need in the presence of the District Attorney . . . because in so doing . . . I may jeopardize my client's defense." The trial court, in its discretion, again ruled that it would "not hold an *in camera* . . . hearing, *ex parte* of the State," to which defendant excepted.

Defendant's court-appointed attorney was permitted to withdraw as counsel on 13 December 1990. He was succeeded by the appointment of the Public Defender, who was subsequently disqualified following a hearing on the State's motion because of a potential conflict of interest.

On 3 September 1991 Judge Coy Brewer, Jr., heard two motions from a third court-appointed attorney. The first motion requested that defendant be committed to Dorothea Dix Hospital for an evaluation of his competency to proceed to trial. In the second the attorney requested the court's permission to withdraw as defendant's counsel. Both motions were granted, and on 5 September 1991 a fourth attorney was appointed to represent defendant.

On 21 November 1991 Judge J. Milton Read, Jr., held a hearing regarding defendant's competency to stand trial. Dr. Patricio P. Lara, a forensic psychiatrist at Dorothea Dix Hospital, testified that defendant had declined to take psychological tests

normally given to patients undergoing evaluation. Nevertheless, defendant was interviewed and observed over the course of eighteen or nineteen days at the hospital, and Dr. Lara was able to conclude, based on these observations, that defendant was competent to stand trial.

On 10 February 1992 defendant's fourth court-appointed attorney moved to withdraw as counsel, in part because defendant had recently refused to meet with him or to respond to the attorney's letters. Subsequently, at trial, defendant stated that he wished to represent himself; the trial court allowed defendant to proceed *pro se* and directed defendant's fourth counsel to assist him in his defense.

Defendant contends that denying his motion for an *ex parte* hearing of evidence supporting his request for the assistance of a psychiatric expert forced him to jeopardize his privilege against self-incrimination and his right to the effective assistance of counsel, guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. We agree.

In ***Ake v. Oklahoma***, 470 U.S. 68, 84 L. Ed. 2d 53 (1985), the Supreme Court held that once a defendant has made "an *ex parte* threshold showing to the trial court that his sanity is likely to be a significant factor in his defense," fundamental fairness requires "the State . . . , at a minimum, [to] assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." ***Ake***, 470 U.S. at 82-83, 84 L. Ed. 2d at 66. Since ***Ake***, this Court has frequently recognized that "fundamental fairness and the principle that an indigent defendant must be given a fair opportunity to present his defense" underlie the indigent defendant's right to the assistance of an expert at state expense. ***State v. Parks***, 331 N.C. 649, 655, 417 S.E.2d 467, 471 (1992) (quoting ***State v. Tucker***, 329 N.C. 709, 718, 407 S.E.2d

805, 811 (1991)). We have applied these principles to defendants' motions for many kinds of experts, including independent investigators, *e.g.*, ***State v. Hickey***, 317 N.C. 457, 346 S.E.2d 646 (1986); pathologists, *e.g.*, ***State v. Penley***, 318 N.C. 30, 347 S.E.2d 783 (1986); medical experts, *e.g.*, ***State v. Johnson***, 317 N.C. 193, 344 S.E.2d 775 (1986); psychiatrists, *e.g.*, ***State v. Parks***, 331 N.C. 649, 417 S.E.2d 467; and fingerprint experts, *e.g.*, ***State v. Phipps***, 331 N.C. 427, 418 S.E.2d 178 (1992). In each of these cases we have noted, in accord with Ake, that the indigent defendant is entitled to the assistance of an expert in preparation of his defense when he makes a "threshold showing of specific necessity." *E.g.*, ***State v. Parks***, 331 N.C. at 656, 417 S.E.2d at 471. The indigent defendant must "make[] a particularized showing that (1) he will be deprived of a fair trial without the expert assistance, or (2) there is a reasonable likelihood that it would materially assist him in the preparation of his case." *Id.*

In none of these cases, however, did we address directly the question raised in this appeal -- whether the trial court is constitutionally required, upon timely motion, to allow a defendant to show a need for psychiatric assistance in an *ex parte* hearing. In ***State v. Phipps***, 331 N.C. 427, 418 S.E.2d 178, this Court considered whether a defendant's rights to due process of law, to effective assistance of counsel, and to reliable sentencing in a capital trial mandated that his motion for an independent fingerprint expert be heard *ex parte*. Under the facts of that case, we concluded: "Whereas an indigent defendant's access to the 'basic tools of an adequate defense' is a core requirement of a fundamentally fair trial, the need for an *ex parte* hearing on a motion for expert assistance is not." ***Phipps***, 331 N.C. at 450, 418 S.E.2d at 190 (quoting ***Ake***, 470 U.S. at 77, 84 L. Ed. 2d at 62). Although we stated in ***Phipps*** that "an *ex parte* hearing is not constitutionally required in every case," we acknowledged that "[t]here are strong reasons for conducting the hearing *ex parte*," *id.* at 451, 418 S.E.2d at 191, including the defendant's

"right to obtain [the expert] assistance [necessary to assist in preparing his defense] without losing the opportunity to prepare the defense in secret." *Id.* at 449, 418 S.E.2d at 189 (quoting ***Brooks v. State***, 259 Ga. 562, 565, 385 S.E.2d 81, 84 (1989)).

When the indigent defendant is seeking the assistance of a psychiatric expert, the "strong reasons for conducting the hearing *ex parte*" are especially applicable. To expose to the State testimony and evidence supporting a defendant's request for an independent psychological evaluation and a psychiatrist's trial assistance lays bare his insanity or related defense strategy. A hearing open to the State necessarily impinges upon the defendant's right to the assistance of counsel and his privilege against self-incrimination. We hold that these constitutional rights and privileges, guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, entitle an indigent defendant to an *ex parte* hearing on his request for a psychiatric expert.

That the defendant in ***Phipps*** was requesting an *ex parte* hearing in order to apply for funds for a *fingerprint* expert distinguishes that case critically from the case now before us. The key difference between a hearing on the question of an indigent defendant's right to a fingerprint expert and one on the question of his right to a psychiatric expert is that the object of adversarial scrutiny is not mere physical evidence, but the defendant himself. The matter is not tactile and objective, but one of an intensely sensitive, personal nature. The public, adversarial nature of an open hearing is inevitably intimidating when the issue is the defendant's mental instability. This atmosphere can daunt the defendant's desire to put before the trial court all his evidence in support of his motion. This was plainly one reason defendant in this case failed to make a threshold showing of his need for an independent psychiatric expert: he was willing to

present evidence to the trial court in chambers, but he was not willing to reveal it to the State.

Moreover, because the area of psychiatric expertise differs importantly from that of fingerprint analysis, defendant's constitutional rights are far less likely to be jeopardized by the presence of the prosecutor when defendant attempts a threshold showing for a fingerprint expert than when he offers evidence to support his need for a psychiatrist. *See* ***State v. Moore***, 321 N.C. 327, 348-49, 364 S.E.2d 648, 659 (1988) (Mitchell, J., concurring) ("The issue of sanity is one about which experts can and frequently do disagree, even though all experts in the field have received years of intensive and highly specialized and demanding training. . . . The taking and analysis of fingerprints is largely a mechanical function, although admittedly one which requires some training and experience."). In ***State v. Moore***, we held that the defendant made the requisite threshold showing of specific necessity for a fingerprint expert by showing that (1) he would be unable to assess adequately the State's conclusion that a palm print found at the scene of the crime was his; (2) because there were no eyewitnesses to the crime, the print was critical evidence; and (3) defendant's mental retardation limited his abilities to communicate and reason and thus his ability to assist his counsel in his defense. ***Moore***, 321 N.C. at 344-45, 364 S.E.2d at 653. None of these statements nor their underlying proof, including objective evidence of the defendant's mental retardation, would jeopardize the defendant's privilege against self-incrimination or violate his right to the effective assistance of counsel or the associated attorney-client privilege.

The privilege against self-incrimination, guaranteed by the Fifth and Fourteenth Amendments, is to be liberally construed. It applies not only to criminal prosecutions but to any proceeding sanctioned by law and to any investigation, litigious or not. ***Allred v. Graves***, 261 N.C. 31, 35, 134 S.E.2d 186, 190

(1964) (quoting 98 C.J.S. Witnesses § 433, at 245 (1955)). "[T]he protection afforded by the privilege against self-incrimination 'does not merely encompass evidence which may lead to criminal conviction, but includes information which would furnish a link in the chain of evidence that could lead to prosecution, as well as evidence which an individual reasonably believes could be used against him in a criminal prosecution.'" ***Trust Co. v. Grainger***, 42 N.C. App. 337, 339, 256 S.E.2d 500, 502, *cert. denied*, 298 N.C. 304, 259 S.E.2d 300 (1979) (quoting ***Maness v. Meyers***, 419 U.S. 449, 461, 42 L. Ed. 2d 574, 585 (1975)). The privilege against self-incrimination protects against real, not remote and speculative dangers, ***Zicarelli v. Investigation Comm'n***, 406 U.S. 472, 478, 32 L. Ed. 2d 234, 240 (1972), quoted in ***Trust Co. v. Grainger***, 42 N.C. App. at 339, 256 S.E.2d at 502, but a witness need not prove the hazard. To require him to do so would compel him to surrender the very protection the privilege is designed to guarantee. The privilege, to be sustained, need be evident only from the implications of the question and in the setting in which it is asked. These must show only that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. ***Hoffman v. United States***, 341 U.S. 479, 486-87, 95 L. Ed. 2d 1118, 1124 (1951), quoted in ***Trust Co. v. Grainger***, 42 N.C. App. at 339-40, 256 S.E.2d at 502, and in ***State v. Smith***, 13 N.C. App. 46, 52, 184 S.E.2d 906, 910 (1971).

In the setting of a pre-trial hearing at which the defendant must make a threshold showing of need for psychiatric assistance or risk losing his opportunity to rely on the defense of insanity, what the defendant must divulge is compelled by the circumstances; his statements, therefore, are not voluntary testimony by which he would waive the privilege. *See* ***Marshall v. United States***, 423 F.2d 1315, 1318 (10th Cir. 1970) ("Certainly the movant cannot be said to 'waive' disclosure of his case and his concomitant rights against self-incrimination and to due process

by proceeding under subsection [3006A](e)."[1]). *Cf.* ***Harrison v. U.S.***, 392 U.S. 219, 222, 20 L. Ed.2d 1047, 1051 (1968) (a defendant who chooses to testify waives his privilege against compulsory self-incrimination with respect to the testimony he gives); ***State v. Glover***, 77 N.C. App. 418, 421, 250 S.E.2d 86, 89 (1978).

When a defendant has already been evaluated by a psychiatrist, who is to aid in the defendant's showing, the information at the psychiatrist's disposal may include "not only what [the patient's] words directly express; he lays bare his entire self, his dreams, his fantasies, his sins, and his shame." ***Taylor v. United States***, 222 F.2d 398, 401 (1955) (quoting Manfred F. Guttmacher and Henry Weihofen, *Psychiatry and the Law* 272 (1952)). When a defendant must make this showing absent such assistance, he somehow must prove to the court the instability of his mental state at the time of the crime, not only opening his thoughts and feelings to public and prosecutorial scrutiny, but also risking exposure of his role in potentially incriminating events in which such thoughts and feelings arose. Cross-examination by the State exacerbates the risk.

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1 18 U.S.C. 3006A(e)(1) (1988) provides, in pertinent part:

> Upon request.--Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for adequate representation may request them in an ex parte application. Upon finding, after appropriate inquiry in an ex parte proceeding, that the services are necessary and that the person is financially unable to obtain them, the court, or the United States magistrate if the services are required in connection with a matter over which he has jurisdiction, shall authorize counsel to obtain the services.

The Sixth Amendment right to the assistance of counsel presupposes the right to the *effective* assistance of counsel. *E.g.*, ***McMann v. Richardson***, 397 U.S. 759, 771 n.14, 25 L. Ed. 2d 763, 773 n.14 (1970). The effective assistance of counsel requires adequate trial preparation, including access to expert witnesses where appropriate. *See* ***United States v. Wright***, 489 F.2d 1181, 1188 n.6 (D.C. Cir. 1973); *see also, e.g.*, ***Mason v. Arizona***, 504 F.2d 1345, 1351 (1974), *cert. denied*, 420 U.S. 936, 43 L. Ed. 2d 412 (1975) (due process right to effective assistance of counsel includes right to ancillary services necessary in the preparation of a defense). When insanity is the principal defense, access to psychiatric experts is essential to assist the attorney in presenting an adequate case. ***United States v. Taylor***, 437 F.2d 371, 377 n.9 (4th Cir. 1971); ***United States ex rel. Edney v. Smith***, 425 F. Supp. 1038, 1047 (1976), *aff'd*, 556 F.2d 556 (2d Cir.), *cert. denied*, 431 U.S. 958, 53 L. Ed. 2d 276 (1977); *see also* ***Ake***, 470 U.S. at 82, 84 L. Ed. 2d at 65 (psychiatrist can assist in determining whether the insanity defense is viable, in presenting testimony, and in preparing for cross-examination of the State's psychiatric witnesses).

The attorney-client privilege, critical to the effective assistance of counsel, "rests on the theory that encouraging clients to make the fullest disclosure to their attorneys enables the latter to act more effectively, justly and expeditiously -- benefits outweighing the risks of truth-finding posed by barring full disclosure in court." ***United States ex rel. Edney v. Smith***, 425 F. Supp. at 1046. A defendant's disclosures to his counsel cannot be used to furnish proof in the government's case. "Disclosures made to the attorney's expert should be equally unavailable, at least until he is placed on the witness stand. The attorney must be free to make an informed judgment with respect to the best course for the defense without the inhibition of creating a potential government witness." *Id.* at 1054.

The *ex parte* hearing procedure may be a critical component of the indigent defendant's right to expert psychiatric assistance -- itself an indispensable tool to his defense once he has made a threshold showing of need. A hearing out of the presence of the prosecutor protects the defendant's insanity or diminished capacity defense strategy and enables him to put forward his best evidence in support of a motion that, if granted, might give him a reasonable chance of success, but if denied could devastate his defense. *See* ***Ake***, 470 U.S. at 83, 84 L. Ed. 2d at 66. Only in the relative freedom of a nonadversarial atmosphere can the defense drop inhibitions regarding its strategies and put before the trial court all available evidence of a need for psychiatric assistance. Only in such an atmosphere can the defendant's privilege against self-incrimination and his right to the effective assistance of counsel not be subject to potential violation by the presence of the State.

We thus hold that the trial court erred in denying defendant an *ex parte* hearing on his timely request for the appointment of a psychiatrist in violation of rights guaranteed him under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution. Because we cannot know what defendant would have presented in support of his request had he not been required to make his showing in open court,[2] we cannot say that the error was harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b) (1988). Defendant therefore is entitled to a new trial.

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2 We cannot expect defendant here to have made an offer of proof. "It could hardly be thought if the court would not hear the defendant outside of the presence of the governmentattorney that it would have heard an offer of proof with any greater privacy." *Holden v. United States*, 393 F.2d 276, 278 (1st Cir. 1968).

Because we award a new trial, we need not consider defendant's remaining assignments of error, which are unlikely to recur upon retrial.

NEW TRIAL.

IN THE SUPREME COURT OF NORTH CAROLINA

FILED
April 8, 1993

STATE OF NORTH CAROLINA	)	
	)	
v.	)	No. 145A91 - Yadkin
	)	
JOSEPH EARL BATES	)	

Appeal of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Rousseau, J., at the 25 February 1991 Special Criminal Session of Superior Court, Yadkin County, on a jury verdict finding defendant guilty of first-degree murder and first-degree kidnapping. On 15 April 1992 this Court allowed defendant's motion to bypass the Court of Appeals on the kidnapping conviction. Heard in the Supreme Court 6 October 1992.

Lacy H. Thornburg, Attorney General, by David F. Hoke, Assistant Attorney General, for the State.

Malcolm R. Hunter, Jr., Appellate Defender, by Gordon Widenhouse, Assistant Appellate Defender, for defendant appellant.

WHICHARD, Justice.

Defendant was tried capitally for murder in the first degree of Charlie Jenkins and, pursuant to the jury's unanimous recommendation, was sentenced to death for the murder. Defendant's pre-trial motion that his preliminary showing of need

for funds to hire a mental health expert be heard *ex parte* was denied by the trial court. We hold, for reasons more fully articulated in ***State v. Ballard***, 333 N.C. 515, ___ S.E.2d ___ (No. 255A92, filed simultaneously herewith), that the trial court's ruling violated defendant's rights under the United States Constitution. As we held in ***Ballard***, this error cannot be shown to have been harmless beyond a reasonable doubt. Defendant is accordingly entitled to a new trial.

On 31 August 1990, following advisement as to his constitutional rights, defendant gave a statement in which he admitted shooting the victim and throwing his hog-tied body into a river. The victim had approached defendant in the parking lot at a bar and asked for a ride home. Defendant had been living in a tent behind his boss's house since someone had broken into and fired into his house. Defendant believed his ex-wife and her boyfriend were responsible for his harassment, and he thought the victim, who later admitted to defendant that he knew defendant's ex-wife, was setting him up and leading him into a trap.

On 29 November 1990 defendant filed a Motion for an *Ex Parte* Hearing at which he would apply for funds necessary to employ expert witnesses to aid in his defense. Defendant's Notice of Defense of Insanity and Intent to Introduce Expert Testimony Relating to Mental Disease, Defect or Condition was filed the next day.

At a pre-trial motions hearing held 18 December 1990, defendant moved orally for an *ex parte* hearing for funds necessary to employ expert witnesses to aid in his defense. The trial court denied defense counsel's specific request that the defense be permitted to present evidence supporting his motion for funds in an *ex parte* hearing. Defense counsel then tendered a Motion for Funds for Expert Assistance, to which he attached an affidavit

by Dr. John Warren, a forensic psychologist. In the affidavit the psychologist concluded "that the defendant was probably psychologically disturbed to a significant degree," based on Dr. Warren's having been informed that at the time of the murder

> [defendant] had been suffering from extreme harassment by an individual or individuals which placed the defendant in such fear that he moved out of his home and into a tent in the woods, could not and did not sleep for a significant period of time, was later fired from his job because of the harassment and became obsessed with this fear for his life [and that] defendant . . . attempted suicide while incarcerated in the Yadkin County Jail.

In addition to Dr. Warren's affidavit, the motion was supported by defendant's testimony as to his depression, stress, and memory loss. Following her cross-examination of defendant, the prosecutor suggested to the trial court that defendant's motion "under all the circumstances, perhaps, . . . should be granted."

The trial court denied defendant's motion for his own expert, but allowed the State's motion that defendant be evaluated in response to defendant's notice of intent to rely on the defense of insanity. The trial court accordingly ordered that defendant be sent to Dorothea Dix Hospital for observation as to his capacity to proceed. The trial court's written order specifically stated that defendant's being committed to Dorothea Dix Hospital was "for purposes of . . . evaluating his sanity at the time of the alleged offenses and determining his capacity to proceed to trial."

The resulting evaluation included findings that defendant was a heavy alcohol drinker with an IQ of 82 who feels uneasy in social situations and is possibly hypersensitive to criticism. The evaluation stated that defendant's memory was "intact with

no obvious perceptual motor difficulties," his cognitive functioning represented no brain dysfunction or deterioration, and his personality showed "[n]o indications of mood thought disorder." The evaluating psychiatrist concluded that defendant *did not* have "a disorder that would prevent him from being capable of proceeding to trial or relieve him of responsibility for his actions."

At an open, pre-trial hearing held 16 January 1991, defense counsel again tendered a motion for the expert assistance of a psychologist. Defense counsel did not reiterate his request that the hearing be *ex parte*. The request was directed specifically at defendant's need for assistance with proof of the mitigating circumstances that the capital felony had been committed while defendant was under the influence of mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2) (1988); the capacity of the defendant to appreciate the criminality of his conduct was impaired, N.C.G.S. § 15A-2000(f)(6) (1988); and the "catchall factor," N.C.G.S. § 15A-2000(f)(9) (1988). To this motion defense counsel attached the affidavit by Dr. Warren and an affidavit by defendant. The results of defendant's evaluation at Dorothea Dix Hospital were also before the court. The trial court again denied defendant's motion for expert assistance.

On 24 January 1991 the trial court filed its written order denying defendant's 29 November 1990 motion for an *ex parte* hearing and denying defendant's 18 December 1990 Motion for Funds for Expert Assistance.

Defendant's petitions for *certiorari* and *supersedeas* and his motion for a temporary stay, filed with this Court 25 January 1991, cited both the trial court's failure to allow defendant's motion for expert assistance to be heard *ex parte* and its denial of the motion itself as subjects of the requested review. This Court denied defendant's petitions on 7 February 1991.

Defendant thus proceeded to trial without the assistance of a psychologist. The jury found him guilty of first-degree kidnapping and of first-degree murder on the bases of both premeditation and deliberation and felony murder. At sentencing the jury found the aggravating circumstances that the murder had been committed while defendant was engaged in the commission of a kidnapping and that it had been especially heinous, atrocious or cruel. Among the circumstances in mitigation the jury found that the murder had been committed while defendant was under the influence of mental or emotional disturbance, but it did not find that the capacity of defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law had been impaired. After weighing the mitigating and aggravating circumstances it had found, the jury recommended that defendant be sentenced to death.

We held in ***State v. Ballard*** that it is error to deny the motion of an indigent defendant for an *ex parte* hearing regarding his request for the assistance of a psychiatrist. We reasoned that the risk of exposing the defendant's insanity or related defense strategy to the State and the associated risks of self-incrimination and encroachment upon the defendant's right to the effective assistance of counsel jeopardize the defendant's rights and privileges under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. ***Ballard*, 333 N.C.** at ___, ___ S.E.2d at ___.

Here, defendant sought the assistance of a forensic psychologist rather than a psychiatrist, but this is a distinction without a difference with regard to a defendant's entitlement to an *ex parte* hearing on the issue of expert assistance regarding an insanity defense. Both psychologists and psychiatrists are trained to recognize and treat mental illness. Their training and expertise, and the fact that the subject of their study cannot be

mechanically assessed, distinguishes them materially from such experts in physical evidence as fingerprint analysts. ***See State v. Moore***, 321 N.C. 327, 348-49, 364 S.E.2d 648, 659 (1988) (Mitchell, J., concurring). But their training, expertise, and subject of study does not significantly differentiate one from the other with regard to the ability of each to assist in an insanity defense.

It is impossible for this Court to know what additional evidence defendant might have proffered in support of his motion had he been able to do so out of the presence of the prosecutor. For this reason, the trial court's error in denying the request for an *ex parte* hearing on his motion for a psychiatrist or psychologist cannot be shown to be harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b) (1988). *See* ***State v. Ballard***, 333 N.C. at ___, ___ S.E.2d at ___. Defendant thus is entitled to a new trial.

We do not address defendant's remaining assignments of error, as they will not likely recur on retrial.

NEW TRIAL.

JUSTICE PARKER did not participate in the consideration or decision of this case.

ORIGINAL

Supreme Court, U.S.
FILED
OCT 22 1993
OFFICE OF THE CLERK

No. 93-143

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

****

STATE OF NORTH CAROLINA,
Petitioner,

v.

LONNIE WINSLOW BALLARD and
JOSEPH EARL BATES,
Respondents.

****

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA

****

RESPONDENTS' BRIEF IN OPPOSITION

****

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QUESTION PRESENTED

WHETHER NORTH CAROLINA, IN ACCORDANCE WITH THE LAW IN VIRTUALLY EVERY JURISDICTION, HAS ADOPTED AN APPROPRIATE METHOD OF IMPLEMENTING AKE V. OKLAHOMA THAT ALLOWS INDIGENT DEFENDANTS TO MAKE A THRESHOLD SHOWING OF NEED FOR EXPERT PSYCHIATRIC ASSISTANCE IN AN EX PARTE HEARING?

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No. 93-143

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

****

STATE OF NORTH CAROLINA,
Petitioner,

v.

LONNIE WINSLOW BALLARD and
JOSEPH EARL BATES,
Respondents.

****

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA

****

RESPONDENTS' BRIEF IN OPPOSITION

****

Respondents, Lonnie Winslow Ballard and Joseph Earl Bates, respectfully oppose and request this Court to deny the Petition for Writ of Certiorari filed by petitioner seeking review of the decisions by the Supreme Court of North Carolina. *See State v. Ballard*, 333 N.C. 515, 428 S.E.2d 178 (1993) and *State v. Bates*, 333 N.C. 523, 428 S.E.2d 693 (1993).

OPINIONS BELOW

JURISDICTION

CONSTITUTIONAL AMENDMENTS AND STATUTES INVOLVED

STATEMENT OF THE CASE

Pursuant to Rules 15.2 and 24.2, these items are omitted since respondents are satisfied with petitioner's statements of the OPINIONS BELOW, JURISDICTION, CONSTITUTIONAL AMENDMENTS AND STATUTORY PROVISIONS, AND STATEMENT OF THE CASE.

REASONS WHY A WRIT SHOULD NOT ISSUE

NORTH CAROLINA, IN ACCORDANCE WITH THE LAW IN VIRTUALLY EVERY JURISDICTION, HAS ADOPTED AN APPROPRIATE METHOD OF IMPLEMENTING AKE V. OKLAHOMA THAT ALLOWS INDIGENT DEFENDANTS TO MAKE A THRESHOLD SHOWING OF NEED FOR EXPERT PSYCHIATRIC ASSISTANCE IN AN EX PARTE HEARING.

In the decisions below, the Supreme Court of North Carolina espoused a reasonable procedure through which indigent defendants could request the assistance of psychiatric experts without revealing their defense strategies to the state. Indigent defendants are constitutionally entitled to the assistance of psychiatric experts upon a threshold showing of need, *Ake v. Oklahoma*, 470 U.S. 68, 82-83 (1985), and North Carolina has consistently followed this principle. *See, e.g., State v. Parks*, 331 N.C. 649,

656, 417 S.E.2d 467, 471 (1992); *State v. Moore*, 321 N.C. 327, 344, 364 S.E.2d 648, 656 (1988); *State v. Gambrell*, 318 N.C. 249, 255, 347 S.E.2d 390, 393 (1986). Contrary to petitioner's assertions, the decisions below do not interpret *Ake* beyond its perimeters. Rather, they merely afford indigent defendants, like respondents, an opportunity to make the threshold showing of need required by *Ake* without injury to other important rights like the attorney-client privilege, the constitutional protection against self-incrimination, and the constitutional right to the effective assistance of counsel. Given the soundness of the decisions below, there is no need for review by this Court.

Despite petitioner's assertions to the contrary, the decisions below neither create a division among the lower courts in interpreting or implementing *Ake* nor raise a serious constitutional question. The purported "discord" among the states, Petition at 15-18, is wholly illusory. In fact, the decisions below are in harmony with virtually every jurisdiction addressing the implementation of *Ake*. Furthermore, the decisions below merely implement the principles articulated in *Ake*, a prerogative petitioner itself acknowledges this Court left to the states. Petition at 9-10 (quoting *Ake*, 470 U.S. at 83). For both of these reasons, the petition should be denied.

A. No Serious Division of Authority Exists Among the Jurisdictions in Their Implementation of the Ake Principle.

The vast majority of lower courts considering the question of whether indigent defendants are entitled to request the assistance of a psychiatric expert in an *ex parte* hearing have resolved it in respondents' favor. *See, e.g., Washington v. State*, 800 P.2d 252 (Okla. Cr. 1990); *State v. Brooks*, 385 S.E.2d 81 (Ga. 1989), *cert. denied*, 483 U.S. 1010 (1990). *Dunn v. State*, 722 S.W.2d 595 (Ark. 1987); *State v. Hoopii*, 710 P.2d 1193 (Haw. 1985); *but see State v. Floody*, 481 N.W.2d 242 (S.D. 1992). Many jurisdictions

also have adopted a similar practice by statute, *see* Kan. Stat. Ann. §22-4508 (1988); S.C. Code Ann. §16-3-26(c) (Law. Co-op. Supp. 1991); Tenn. Code Ann. §40-14-207(3)(b) (1990), as has the United States. 18 U.S.C. §3006A(e)(1) (1988); *see* Fed. R. Crim. P. 17(b). There is no substantial divergence in the way states have chosen to implement the *Ake* standard.

This prevailing rule, followed in the decisions below, is sound. As *Brooks* explained, indigent defendants not only have the right to obtain expert assistance necessary to prepare a defense, but "also have the right to obtain that assistance without losing the opportunity to prepare the defense in secret. Otherwise, the defendant's single 'fair opportunity to present his defense,' acknowledged in *Ake* will be impaired." 385 S.E.2d at 84. The hearing should be *ex parte* not to protect defendant from the prosecution but to protect him "from revealing his theory of the case to the prosecutor." *Id.* at 83. Requiring a defendant to make his showing in the presence of the prosecution would implicate important constitutional rights. Without the protection of an *ex parte* hearing, defendant could be deprived of his privilege against self-incrimination, his right to counsel, and his right to present a defense. To place an indigent defendant in the position of revealing his theory of the case in the presence of the prosecutor when a non-indigent defendant could avoid similar scrutiny would cause serious equal protection problems. *See United States v. Meriwether*, 486 F.2d 498 (5th Cir.), *cert. denied*, 417 U.S. 948 (1974). An indigent defendant "has a legitimate interest in making [the necessary *Ake*] showing *ex parte*." *Brooks*, 385 S.E.2d at 84.

Oklahoma reached a similar conclusion. *E.g.*, *McGregor v. State*, 733 P.2d 417 (Okla. Cr. 1987). In *McGregor*, an indigent defendant sought to make his threshold showing under *Ake* in an *ex parte* fashion. The trial court refused, and defendant sought a writ of prohibition. The appellate court granted the writ and explained there was

> no need for an adversarial proceeding, that to allow participation, or even presence, by the State would thwart the Supreme Court's attempt to place indigent defendants, as nearly as possible, on a level of equality with nonindigent defendants.

Id. at 716. Hawaii reached the same result in a similar situation. *E.g., Arnold v. Higa*, 600 P.2d 1383 (Haw. 1979). In granting a writ of prohibition, the appellate court noted petitioner had not been given an opportunity to show his need for expert assistance. It concluded that "an *ex parte* hearing to make necessary findings is appropriate." *Id.* at 1385. Although no statute required the hearing to be conducted in an *ex parte* fashion, "when defendant requests one, the judge should allow counsel to particularize his reasons for the services without disclosing his defense theory or tactics to the prosecution." *Id.*; *accord People v. Worthy*, 167 Cal. Rptr. 402, 109 Cal. App. 3d 514 (1980) (to avoid revelation of defense strategy, an indigent showing in need of expert assistance to obtain appointment of experts may be by "an *ex parte in camera* hearing"). *See also Zant v. Brantley*, 411 S.E.2d 869 (Ga. 1992) (prosecution properly excluded from post-conviction hearing seeking new trial based upon ineffective assistance of counsel in failing to obtain necessary expert assistance because defendant should not be required to reveal his theory of the case to the prosecution).

Respondent relies solely on *Floody* as the example of a state procedure in which a request for expert assistance could not be made *ex parte*. There, however, the state's presence was required by a statute which enjoyed a presumption of constitutionality. 481 N.W.2d at 255. A rule that is part of a state's criminal process will not be invalidated under a due process challenge "unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Medina v. California*, 505 U.S. ____, 120 L.Ed.2d 353, 363 (1992) (quoting *Patterson v. New York*, 432 U.S. 197, 201-02 (1977)) The expert assistance requested in *Floody*

concerned an analysis of the interview techniques used by state investigators who questioned the alleged victim of sexual abuse. Unlike a request for psychiatric assistance, this showing would not have required disclosure of a defendant's confidences about his mental state. On those facts, the South Dakota Supreme Court found no basis to disturb the legislative policy. That decision, premised on the absence of a legitimate constitutional challenge to an otherwise valid state statute, hardly evidences a split among the lower courts worthy of certiorari review.

It is fundamentally unfair to require an indigent accused, like respondents, to provide the prosecution with information about his case that a wealthy accused would not have to disclose. By requiring an indigent defendant to apply for funds in open court, such a procedure would force him to reveal to the prosecution not only the identity of experts he intends to consult, but also their significance to his case. These revelations are not required under North Carolina's discovery statutes. *See* N.C. Gen. Stat. §15A-901 *et. seq.* (1973). Under petitioner's analysis, a defendant should be forced to disclose crucial defense strategy and psychiatric information solely because of his status as an indigent. The majority rule to the contrary should not be disturbed.

B. The Decisions Below Implemented Ake by Allowing Respondents to Make Threshold Showings of Their Need for Psychiatric Experts in an Ex Parte Hearing.

In *State v. Ballard*, 333 N.C. 515, 428 S.E.2d 178 (1993) and *State v. Bates*, 333 N.C. 523, 428 S.E.2d 693 (1993), the North Carolina Supreme Court made a policy decision to allow indigent defendants to request the assistance of psychiatric experts without revealing their defense strategies to the state. Where an indigent defendant makes a threshold showing that his mental condition is likely to be at issue in a criminal

proceeding, the state must assure him access to a competent psychiatrist to assist in the preparation of his defense. *Ake v. Oklahoma*, 470 U.S. 68, 83-84 (1985). *Ballard* and *Bates* do no more than create a North Carolina procedural rule which implements *Ake* without jeopardizing other constitutional rights and state law privileges, including the privilege against self-incrimination, the right to effective assistance of counsel, and the attorney-client privilege. By establishing rules to implement *Ake* within North Carolina, the court below acted within the authority granted it by *Ake* itself. 470 U.S. at 83. Thus, the decisions below raise no issue of federal constitutional law worthy of certiorari review by this Court.

Prior to this Court's decision in *Ake*, North Carolina state statutes had been interpreted to require the appointment of any type of expert to assist the defendant upon a showing that the expert would materially assist the defendant in the preparation of his defense or that absent such assistance, the defendant would not receive a fair trial. N.C. Gen. Stat. § 7A-450, 454; *State v. Williams*, 304 N.C. 394, 284 S.E.2d 437 (1981), *cert. denied*, 456 U.S. 932 (1982). The North Carolina Supreme Court has since reconciled its interpretation of these statutes with *Ake*. *See, e.g., State v. Parks*, 331 N.C. 649, 656, 417 S.E.2d 467, 471 (1992) ("*Ake*'s 'significant factor' test is satisfied when an indigent defendant makes a particularized showing that (1) he would be deprived of a fair trial without the expert assistance, or (2) there is a reasonable likelihood that it would materially assist him in the preparation of his case"); *see also State v. Moore*, 321 N.C. 327, 364 S.E.2d 648 (1988). These principles have been applied to motions for many kinds of experts. *See, e.g, State v. Hickey*, 317 N.C. 457, 346 S.E.2d 646 (1986) (independent investigator sought by defense); *State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986) (medical expert sought by defense)

The North Carolina Supreme Court recently has considered the question of whether threshold showings of the need for expert assistance may be made *ex parte*. Although "[t]here are strong reasons for conducting [such] hearings *ex parte* and the [trial] court may in its discretion do so," the court concluded, "an *ex parte* hearing is not constitutionally required in every case." *State v. Phipps*, 331 N.C. 427, 418 S.E.2d 178 (1992).

Ballard and *Bates* found reversible error where respondents were not allowed to request the assistance of psychiatric experts *ex parte*. *Ballard*, 333 N.C. at 516, 428 S.E.2d at 179; *Bates*, 333 N.C. at 524, 428 S.E.2d at 693. The decisions below rest on two grounds. First, the lower court reasoned that conducting hearings on the need for psychiatric assistance in open court would have a chilling effect on defendants' willingness to exercise their right to such assistance. "The public, adversarial nature of an open hearing is inevitably intimidating when the issue is the defendant's mental instability. This atmosphere can daunt the defendant's desire to put before the trial court all of his evidence in support of his motion." *Ballard*, 333 N.C. at 519, 428 S.E.2d at 180-81. Second, unless showings for psychiatric experts were conducted *ex parte*, respondents' other constitutional rights and state law privileges would be jeopardized, including: the privilege against self-incrimination; the right to effective assistance of counsel; and the attorney-client privilege. The information a defendant typically must present in order to obtain the assistance of a mental health expert may "[expose the defendant's] role in potentially incriminating events," or invade areas of privileged attorney-client communications. *Ballard*, 333 N.C. at 521-22, 428 S.E.2d at 182. Without the protection of *ex parte* hearings on motions for expert psychiatric assistance, respondents would be forced to make the Hobson's choice between disclosing privileged information to the state, or foregoing their constitutional right to the assistance of a psychiatrist. Similarly, respondents' attorneys would be unable to

render effective assistance of counsel if forced to choose between breaching their duty of loyalty to their client, or proceeding to trial without the assistance of a needed expert.

The assertion in *Ballard* that "an indigent defendant who requests that evidence supporting his motion for expert psychiatric assistance be presented in an *ex parte* hearing is constitutionally entitled to have such a hearing," 333 N.C. at 516, 428 S.E.2d at 179, and the fact that the North Carolina Supreme Court found constitutional error in *Bates*, must be understood in context of the argument discussed above. *Ballard* and *Bates* require *ex parte* hearings on motions for psychiatric experts in order to implement *Ake* while protecting well-established constitutional rights and privileges.

Contrary to the state's implication, Petition for Certiorari at 15, *Ballard* did not overrule *Phipps*. *Phipps* held that the trial court did not abuse its discretion by denying defendant's motion for an *ex parte* hearing on defendant's request for a fingerprint expert to assist in the preparation of his defense. 331 N.C. 451, 418 S.E.2d 191. The lower court carefully distinguished *Phipps* based on the significantly different types of experts requested.

> That the defendant in *Phipps* was requesting an *ex parte* hearing in order to apply for funds for a *fingerprint* expert distinguishes that case critically from the case now before us. The key difference between a hearing on the question of an indigent defendant's right to a fingerprint expert and one on the question of his right to a psychiatric expert is that the object of adversarial scrutiny is not mere physical evidence, but the defendant himself. The matter is not tactile and objective, but one of an intensely sensitive, personal nature.

333 N.C. at 519, 428 S.E.2d at 180. (emphasis in original). Because of the objective, factual nature of the information that would support a request for a

fingerprint expert "defendant's constitutional rights are far less likely to be jeopardized by the presence of the prosecutor when defendant attempts a threshold showing for a fingerprint expert than when he offers evidence to support his need for a psychiatrist." *Id.* at 519, 428 S.E.2d at 181. Thus, the state's claim in its Petition for Certiorari that, "North Carolina is now encumbered with a[n] . . . *ex parte* mandate for all *Ake* threshold showings" is overbroad. *See* Petition for Writ of Certiorari at 15.

North Carolina has addressed this issue only with respect to two types of experts, technical forensic experts and mental health experts. With respect to technical forensic experts, trial courts have the discretion to allow an indigent defendant to make his threshold showing on the need for an expert *ex parte*; they are not required to do so. *Phipps*, 331 N.C. 427, 418 S.E.2d 178 (1992). Only with respect to psychiatric experts must trial courts allow defendants to make their showings of particularized need in an *ex parte* hearing. *State v. Ballard*, 333 N.C. 515, 428 S.E.2d 178 (1993); *State v. Bates*, 333 N.C. 523, 428 S.E.2d 693 (1993).

Articulating the contours of an indigent's entitlement to *ex parte* hearings on the need for various types of expert assistance will require balancing policy considerations, interpreting state statutes on the rights of indigents, and determining precisely how to implement the mandate of *Ake*. As this Court wisely ruled in *Ake*, this is a question of state policy.

In sum, the lower court has not "deliberate[ly] creat[ed] . . . a federal constitutional right." Petition for Certiorari at 7. North Carolina has chosen to implement *Ake* by adopting the unexceptional and widely used practice of allowing indigents to request the assistance of psychiatric experts in an *ex parte* hearing. This method of implementing *Ake* raises no federal constitutional issue worthy of review by this Court.

CONCLUSION

For the reasons stated herein, respondents respectfully request that the Petition for Writ of Certiorari be denied.

This the 22nd day of October, 1993.

Respectfully submitted,

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93-143

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

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RECEIVED
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SUPREME COURT, U.S.

STATE OF NORTH CAROLINA,
Petitioner,
v.
LONNIE WINSLOW BALLARD
and
JOSEPH EARL BATES,
Respondents.

****

AFFIDAVIT OF MAILING OF RESPONDENTS' BRIEF IN OPPOSITION

****

Gordon Widenhouse, being duly sworn, deposes and says:

I am a member of the Bar of the Supreme Court of the United States.

On 22 October 1993, I deposited in the United States Post Office at Martin Street, Raleigh, North Carolina 27602, an envelope addressed to the Clerk of the Supreme Court of the United States, first-class postage pre-paid, containing the original and twelve (12) copies of Respondents' Brief in Opposition in the above-entitled case together with Respondents' Motions to Proceed *In Forma Pauperis* (with supporting affidavit) and Certificate of Service.

This the 22nd day of October, 1993.

Gordon Widenhouse
Assistant Appellate Defender
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(919) 733-9490
COUNSEL OF RECORD FOR RESPONDENTS

Subscribed and sworn to before me this 22nd day of October, 1993.

Notary Public

My Commission Expires: 11-28-95